

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
GENERGY WORLDWIDE INC., : Docket #14cv4131
Plaintiff, :
- against - : New York, New York
SOURCEONE INC., et al., : September 4, 2014
Defendants. :
----- :

PROCEEDINGS BEFORE
THE HONORABLE PAUL A. CROTTY,
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For Plaintiff: FERBER CHAN ESSNER & KOHLER
BY: ROBERT KAPLAN, ESQ.
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For Defendants: NIXON PEABODY
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<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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THE COURT: Good afternoon. Please be seated.

THE CLERK: Your Honor, this is the matter of
Genergy Worldwide Inc. v. Sourceone Inc., docket number
14cv4131. Counsel for plaintiff, please state your
appearance for the record.

MR. ROBERT KAPLAN: Robert Kaplan of Ferber Chan
Essner & Kohler, 530 Fifth Avenue, New York, New York
10036. Good afternoon, Your Honor.

THE COURT: Hello, Mr. Kaplan, how you are?

MR. KAPLAN: Okay, how are you?

THE COURT: Been in the sun?

MR. KAPLAN: What?

THE COURT: You've been in the sun?

MR. KAPLAN: I was at the U.S. Open on Monday.

THE COURT: Okay. You look relaxed.

THE CLERK: For defendant.

THE COURT: Tanned and relaxed I should say.

MR. JOSEPH ORTEGO: Joseph Ortego, Nixon Peabody,
437 Madison Avenue, New York, New York.

THE COURT: Okay, thank you, Mr. Ortego. Mr.
Kaplan, do you want to tell me a little bit about your
matter here?

MR. KAPLAN: Yes, Your Honor. The plaintiff
Genergy is in the metering and utilities management

business. It contracts with large landlords. They keep track of the landlord, the buildings' energy use, and they assist the landlords in determining what tenants, tenants' use of utilities and billing tenants for their energy usage.

In this case we allege that the defendants, there's an individual defendant, Giuseppe Giammo, who is a former senior person at Genenergy. He now works for Sourceone which is in the same business. And we allege that for a number of years the defendants have been hacking into Genenergy's computers and information systems and stealing information, commercial information. And Mr. Giammo last year pled guilty in New York City criminal court to unauthorized use of computer, and in his allocution he admitted he had entered plaintiff's computer system without authority on a number of occasions.

So we have asserted four causes of action here under the Stored Communications Act, under the Computer Fraud and Abuse Act, as well as --

THE COURT: Common law conversion --

MR. KAPLAN: -- common law cause of action for conversion and misappropriation. I'm sorry, the last cause of action is unfair competition by virtue of their misappropriation.

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THE COURT: Mr. Ortego, you want to make a motion?

MR. ORTEGO: Yes, I do, Your Honor.

THE COURT: First of all, let me ask you, in reading through Mr. Kaplan's papers and your papers, is it correct that you're only moving against the first and third claims?

MR. ORTEGO: That is correct --

THE COURT: The Stored Communication Act and the conversion?

MR. ORTEGO: That is correct, Your Honor, but with regard to the other counts, some of them are barred by the statute of limitations. Because in the complaint it alleges a period of time in which those actions prior to that time would be barred by the statute of limitations. So with regard to those counts, yes, we move to dismiss in the entirety with those two counts. With regard to the other two counts, the statute bars certain actions prior to those dates of the statute of limitations. So on its face the action is barred in part.

THE COURT: Now, let me ask you, Mr. Kaplan, at page 2 of your letter of August 8, you say you can easily amend your first cause of action to avoid unnecessary litigation over this issue as plaintiff can state a cause

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2 of action under that statute even if the computer system is
3 not such a facility. Do you want to amend your pleading
4 now?

5 MR. KAPLAN: Yes, Your Honor.

6 THE COURT: Okay. What about discovery? I mean
7 there's two claims here, Mr. Ortego, that you're not moving
8 against, is that correct?

9 MR. ORTEGO: I'm moving only in part of those,
10 Your Honor, that is correct. They will remain. On its
11 face many of the allegations for the time period are barred
12 by the statute of limitations. So the answer is correct,
13 Judge, with regard to those other two counts, they will
14 remain. This motion would not be dispositive if granted.

15 THE COURT: Do you want discovery, Mr. Kaplan?

16 MR. KAPLAN: Absolutely, Your Honor. Could I
17 just address the defense's contemplated motion for just a
18 moment?

19 THE COURT: No, I think it's pretty clear that
20 he's allowed to make his motion. So I mean the question is
21 whether we should stay discovery pending the outcome of the
22 motion. That's why I asked if there was --

23 MR. KAPLAN: No, Your Honor, I don't think
24 there's any reason to stay discovery.

25 THE COURT: If there's a couple of claims that

1
2 are still valid --

3 MR. KAPLAN: And it seems to me that, well, you
4 know, it just seems to me that the plaintiff is making this
5 motion to dismiss for failure to start a cause of action
6 simply to get some sort of a motion on file. As indicated
7 in my letter, whatever perceived insufficiency there is in
8 the first cause of action can be easily remedied with
9 regard to conversion claim, I mean the details of that are
10 set forth at length in the complaint. It's undisputed that
11 the conversion of electronic information is actionable
12 under New York law, and we set forth in considerable detail
13 exactly what their conversions are. So I'm not exactly
14 sure what --

15 THE COURT: I'll be candid with you. I don't
16 know enough about the Stored Communication Act to know
17 whether or not his motion is viable or not. But I know
18 under the Rules of the Second Circuit he's entitled to make
19 the motion. Frankly, with regard to the conversion, I
20 think I'm on your side. I don't think that's a, that
21 really has a chance of success, but that is, that's no
22 reason not to allow him to make the motion.

23 So if you want to amend your pleading to correct
24 what you say you can easily correct, how long do you need
25 to do that?

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MR. KAPLAN: I could that within a couple of days, Your Honor.

THE COURT: Okay. Today is Thursday, the 4th. About a week's time?

MR. KAPLAN: That's fine, Your Honor.

THE COURT: Why don't you do it by the 12th.

MR. KAPLAN: Okay.

THE COURT: Friday the 12th. Then, Mr. Ortego, you're free to make your motion. How long do you need to make your motion?

MR. ORTEGO: Two weeks from that date, Your Honor.

THE COURT: So that'd be the - make it by the 26th.

MR. ORTEGO: Yes, please.

THE COURT: The motion to dismiss by September 26. Mr. Kaplan, your time to respond?

MR. KAPLAN: Two weeks, Your Honor?

THE COURT: Pardon?

MR. KAPLAN: Two weeks.

THE COURT: Two weeks. That'd bring us to October 10, and then a week to reply, October 17, Mr. Ortego. In the meantime, by next Friday, the 12th, when Mr. Kaplan is going to file an amended complaint, I'd like to

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see a civil case management plan, which gets us rolling on
discovery. Could we do that?

MR. KAPLAN: Absolutely, Your Honor.

THE COURT: Mr. Ortego?

MR. ORTEGO: Yes, Your Honor.

THE COURT: All right. How big is Nixon Peabody
in New York?

MR. ORTEGO: Well, it's originated --

THE COURT: I know it's originally from
Rochester.

MR. ORTEGO: Rochester and we still have offices
in Buffalo where I think you're from, Your Honor, and
Rochester and Albany and New York.

THE COURT: But is Rochester still the mother
ship?

MR. ORTEGO: Well, that's a political debate,
Judge, at what happens here.

THE COURT: I don't want to get involved.

MR. ORTEGO: No, no, but it is the original firm,
but I will tell you that it has decreased in size as a
result of the Rochester community. That's still the
original office, and most of the administrative things
still come out of that office.

THE COURT: I remember when it used to be Nixon

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Hargrave.

MR. ORTEGO: So do I.

THE COURT: And Gene Hargrave was the general counsel at Eastman Kodak Company which is really dating the whole thing.

MR. ORTEGO: Yeah, it does, and that was the, you know, traditional big client of Nixon Hargrave Devans & Doyle.

THE COURT: Yeah, right. Correct.

MR. ORTEGO: Which no longer - now Kodak has gone the way.

THE COURT: It makes batteries now. Mr. Kaplan, is there anything else to take up?

MR. KAPLAN: No, Your Honor.

THE COURT: Mr. Ortego, anything else you want to bring up?

MR. ORTEGO: No thank you, Your Honor.

THE COURT: Marlon, can you read the dates back?

THE CLERK: Yes, Your Honor. Amend the complaint and civil case management plan by September 12. Schedule of the motion to dismiss is motion by September 26, response by October 10, and reply by October 17.

THE COURT: Okay. Thank you very much, Mr. Kaplan.

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MR. KAPLAN: Thank you, Your Honor.

MR. ORTEGO: Thank you, Your Honor.

THE COURT: Mr. Ortego, thank you very much.

(Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Genergy v. Sourceone, et al., Docket #14cv4131, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature_____

Date: September 12, 2014